Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RUBY McDANIEL, FRANCIS PAGNANELLI, JOSEPH O'HARA, JOSEPH GREGG, JAMES McWILLIAMS, WILLIAM CONLON, EDWARD GERLACH, CHARLES RADICH, OTTO BUCHTA, and WILLIAM RAISER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The district court prevented the admission of evidence on Petitioners' motivation and gave conflicting instructions to the jury concerning the motivation requirement of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (FACE). The Court of Appeals, relying on *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 804 (1999), involving a criminal prosecution under FACE, found Petitioners' mens rea argument precluded. However, in the recent opinion *United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402 (1999), this Court found that a statute with similar "because" language required a nexus between the act and the motivation explicitly proscribed by the statute. Accordingly, the question with respect to FACE's motivational element is:

Was the court of appeals correct in finding that (a) *Weslin* precludes Petitioners from arguing that FACE requires a finding of motivation in a civil prosecution, (b) the district court's conflicting instructions to the jury regarding FACE's motivational requirement did not constitute error, (c) the district court's decision to exclude evidence pertaining to Petitioners' motivation did not constitute error?

2. In *United States v. Halper*, 490 U.S. 435 (1989), this Court found that civil penalties that are punitive in nature may constitute punishment even when the statute calls them civil. Here, the Government proved no damages or costs, and withdrew its claim for statutory damages. In light of these circumstances, the question is:

QUESTIONS PRESENTED – Continued

Whether, in a civil prosecution under FACE in which the Government makes no showing of damage, penalties up to $6,000 assessed against Petitioners are solely punitive in nature and therefore constitute criminal punishment, (a) requiring due process guarantees for Petitioners, (b) representing excessive fines in violation of the Eighth Amendment?

3. The Fifth Amendment to the Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." While dual prosecutions under state and federal law have often been upheld under the doctrine of "dual sovereignty," in *Bartkus v. People of the State of Illinois*, 359 U.S. 121, 79 S. Ct. 676 (1959), this Court articulated an exception to the rule when one prosecuting sovereign could be said to be acting as a tool for the other. The district court failed to allow for a complete record, excluding some evidence of Petitioners' previous state prosecutions under a local statute modeled on FACE, for which Petitioners served time in jail. Accordingly, the question is:

Whether the district court's failure to allow for a full record concerning Petitioners' first prosecution under a state ordinance modeled on FACE, thereby precluding a finding as to (a) whether the *Bartkus* exception to dual sovereignty was applicable, and (b) whether Petitioners have been subject to double jeopardy, constituted error?

LIST OF PARTIES

Petitioners are elderly churchgoers Ruby McDaniel, Joseph O'Hara, Joseph Gregg, James McWilliams, William Conlon, Edward Gerlach, Charles Radich, Otto Buchta and William Raiser, and their young acquaintance Francis Pagnanelli. After attending early morning mass at a Roman Catholic parish in Manhattan, petitioners walked to a nearby abortion clinic where they staged a peaceful sit-in protest in the office waiting room. All ten were defendants in a state criminal proceeding and in a "civil" proceeding in federal district court thereafter. All ten were appellants in the court of appeals.

Respondent is the United States of America.

None of the parties is a corporation under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTION 1

STATEMENT OF FACTS AND PROCEDURAL POSTURE 1

REASONS FOR GRANTING THE WRIT 5

I. BECAUSE 18 U.S.C. § 248 REQUIRES PROOF OF A MOTIVATIONAL ELEMENT, PETITIONERS DID NOT STIPULATE TO THIS ELEMENT, THE DISTRICT COURT LIMITED EVIDENCE AS TO MOTIVATION, AND THE COURT THEN GAVE CONFLICTING JURY INSTRUCTION, THE CIVIL PENALTIES CANNOT STAND 5

A. THE PLAIN LANGUAGE OF 18 U.S.C. § 248 REQUIRES PROOF OF A MOTIVATIONAL ELEMENT – "BECAUSE THAT PERSON IS OR HAS BEEN OBTAINING OR PROVIDING REPRODUCTIVE HEALTH SERVICES" 5

B. PETITIONERS' STIPULATION SHOULD NOT BE READ AS CONCEDING PETITIONERS' VIOLATION OF FACE'S MOTIVATIONAL ELEMENT 11

C. THE CONDUCT OF THE DISTRICT COURT STRIPPED THE JURY OF ITS FACT-FINDING FUNCTION FOR THE ELEMENT OF MOTIVATION, HOPELESSLY CONFUSING THE JURY ON THIS ISSUE 12

TABLE OF CONTENTS – Continued

Page

II. BECAUSE THE PENALTIES HERE WERE CRIMINAL AND THEREFORE REQUIRED DUE PROCESS PROTECTIONS AND IMPLICATE DOUBLE JEOPARDY CONCERNS, THESE PENALTIES CANNOT STAND 14

A. THE PENALTIES HAD NO RELATION TO ANY DAMAGE SUFFERED BY THE GOVERNMENT, WERE NOT REMEDIAL, BUT PUNITIVE IN NATURE, AND THEREFORE CRIMINAL, REQUIRING DUE PROCESS PROTECTIONS..... 14

B. ANY EVIDENCE THAT MAY HAVE TENDED TO SHOW THAT THE FEDERAL PROSECUTION FOLLOWING THE STATE PROSECUTION IN THIS CASE VIOLATED THE DOUBLE JEOPARDY PROHIBITION WAS EXCLUDED..... 17

CONCLUSION 21

APPENDIX

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.....App. 1

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT...App. 7

TABLE OF AUTHORITIES

Page

CASES

Abbate v. United States, 359 U.S. 187 (1959) 19

Bartkus v. People of the State of Illinois, 359 U.S. 121, 79 S. Ct. 676 (1959) 17, 18, 19, 20

Houston v. Moore, 5 Wheat. 1 (1820) 19

Hudson v. United States, 522 U.S. 93 (1997) ... 15, 16, 17

In re M.S., 10 Cal. 4th 698, 896 P.2d 1365 (1995) 8

Personnel Administrator of Massachusetts et al. v. Feeney, 442 U.S. 256, 99 S. Ct. 2282 (1979) 11

State v. Plowman, 314 Ore. 157, 838 P.2d 558 (1992) 7

United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir.), *cert. denied*, 506 U.S. 815, 113 S. Ct. 55 (1992) 15

United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483 (2d Cir. 1995) 19

United States v. Brewster, 506 F.2d 62 (1974) 14

United States v. Grims, 641 F.2d 96 (3d Cir. 1981) 19

United States v. Halper, 490 U.S. 435 (1989) .. 14, 15, 16, 17

United States v. Pimental, 979 F.2d 282 (2d Cir. 1992) 8, 9

United States v. Sun-Diamond Growers of California, 119 S. Ct. 1402 (1999) 8, 14

United States v. Weslin, 156 F.3d 292 (2d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 804 (1999) .. 9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND ORDINANCES

18 U.S.C. § 201(c)(1)(A) 8

18 U.S.C. § 201(g) 14

18 U.S.C. § 245 ..... 5, 6

18 U.S.C. § 245(b)(1) 8, 9

18 U.S.C. § 245(b)(2) 7, 8

18 U.S.C. § 245(e)(5) 10

18 U.S.C. § 248 ..... 1, 5, 8, 9

18 U.S.C. § 248(a)(1) 6, 10

28 U.S.C. § 1254(1) 1

42 U.S.C. § 3631 ..... 5, 6, 7

NYC ADMIN. CODE, Title 8, § 8-803 (1994) 2

OTHER AUTHORITIES

S. Rep. No. 103-117 (1993) 6, 7, 10

DECISIONS BELOW

This civil case was tried to a jury in federal district court before the Honorable John E. Sprizzo, United States District Court Judge for the Southern District of New York. Petitioners were found liable under the civil provisions of 18 U.S.C. § 248 and the district court then went forward to set penalties.

The United States Court of Appeals for the Second Circuit affirmed the judgment on March 26, 1999. The decision of the court of appeals is not reported and is set forth in the Appendix.

JURISDICTION

This petition has been filed within 90 days of the March 26, 1999 decision by the court of appeals. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF FACTS AND PROCEDURAL POSTURE

On July 23, 1996, Petitioners entered the Eastern Women's Center, an abortion clinic in Manhattan, and sat in front of an elevator and certain entrance doors leading from the clinic's fifth floor waiting area. *United States v. McDaniel*, 1999 U.S. App. LEXIS 5738, at *2. Almost immediately, local police arrived at the scene and began efforts to remove the Petitioners, while patients and escorts moved to an auxiliary waiting area on another

floor of the facility. *Id.* Following their removal, Petitioners were placed under arrest and charged in State court with Obstructing Governmental Administration, Resisting Arrest, Criminal Trespass, and Obstruction of Access to Reproductive Health Services in violation of Section 8-803 of Title 8 of New York City's administrative code, a local ordinance modeled on FACE. The relevant portion of this latter statute, Section 8-803, states as follows: "It shall be unlawful for any person, with the intent to prevent any other person from obtaining or rendering, or assisting in obtaining or rendering, any reproductive health care service or counseling (1) to physically obstruct or block such other person from entering into or exiting from the entryway or exit of a reproductive health care facility, or the premises in which such a facility is located. . . . "

By way of a stipulated facts trial, Petitioners were convicted under local ordinance 8-803. Each spent several days in jail. On the very same day of conviction, the U.S. Attorney's Office, citing the State court stipulation in its Complaint, brought federal charges under FACE against Petitioners for the same conduct. During trial, the district court judge limited Petitioners from testifying about their prior convictions.

The district court also prevented the Petitioners from testifying on direct examination about their motivation for staging the sit-in protest. The court asserted that "[m]otivation and willfulness [were] not issues [in the

civil proceeding]." SA 259.[1] Later, in upholding a Government's objection and again directly limiting Petitioners' testimony about the State proceedings, the court noted:

> the Government doesn't claim there was any claim of motivation here.
>
> MR. SIEGEL [for the Government]: That is correct.
>
> THE COURT: That is not part of the claim here.
>
> MR. SIEGEL: That is exactly right.

SA 269. Only when the Government's cross-examinations opened the door to the issue of motivation did the court allow some Petitioners to bring in evidence of non-statutory motivation. Petitioner Radich cited "following his church" and "following the example of Martin Luther King protesting the unjust laws in the tradition of civil rights protests" as reasons motivating his actions. SA 274-276. Petitioner Conlon testified that preventing the "killing of children" and "*not* the block[ing] of clinics" was his motivation. SA 287. Petitioner Pagnanelli's testimony referred to his desire to "witness for the pre-born babies and to pray and sing." SA 333-334.

At the trial's end, when the district court instructed the jury, the court first noted that "that element – [done for the purpose of interfering with or preventing people from obtaining reproductive health services] does not

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[1] Citations styled "SA ___." refer to the Second Circuit appellate record, specifically the "Supplemental Appendix for Plaintiff-Appellee," filed by the Government in the Court of Appeals.

appear to be in dispute." SA 396-398. Later, however, the court defined liability only in terms of intentional interference with employees and patients, and asserted that there "wasn't much of an issue of intent." SA 420-421.

The jury found Petitioners liable, and during the penalties phase of the trial, the district court again betrayed a profound confusion concerning the motivational element required by FACE:

> MR. WASHBURN [counsel for Petitioners]: If that is true and their intent was the same intent that Justice Scalia described in *Bray*, then the jury verdict should be vacated.
>
> THE COURT: How can it be vacated?
>
> MR. WASHBURN: Because it is a missing element under the statute.
>
> THE COURT: Motivation isn't an element.
>
> MR. BRODERICK [counsel for Petitioners]: I am saying motivation is an element under FACE whether it is civil or criminal.
>
> THE COURT: Where does the statute make motive an element?

SA 641.

Throughout the penalties phase, the Government declined to make any showing of damages caused by Petitioners' conduct. Nevertheless, the district court imposed penalties ranging from $1,000 to $6,000 upon the Petitioners it deemed able to pay such fines. Petitioners appealed the jury's liability finding and the district court's assessment of fines to the Court of Appeals for the Second Circuit, and that court affirmed.

REASONS FOR GRANTING THE WRIT

I. BECAUSE 18 U.S.C. § 248 REQUIRES PROOF OF A MOTIVATIONAL ELEMENT, PETITIONERS DID NOT STIPULATE TO THIS ELEMENT, THE DISTRICT COURT LIMITED EVIDENCE AS TO MOTIVATION, AND THE COURT THEN GAVE CONFLICTING JURY INSTRUCTION, THE CIVIL PENALTIES CANNOT STAND

A. THE PLAIN LANGUAGE OF 18 U.S.C. § 248 REQUIRES PROOF OF A MOTIVATIONAL ELEMENT – "BECAUSE THAT PERSON IS OR HAS BEEN OBTAINING OR PROVIDING REPRODUCTIVE HEALTH SERVICES"

The court of appeals construed Petitioners' argument to be that the Government must prove that Petitioners acted with a discriminatory animus towards women. *McDaniel* at *2. This we do not contend. Petitioners argue simply that – in the same manner as the Fair Housing Act, 42 U.S.C. § 3631, and the statute outlining federally protected activities, 18 U.S.C. § 245, the civil rights statutes that FACE was modeled after – the prohibited motive required by the statute must be proved in order to impose civil penalties.

I

As shown in section II below, the term "because of" is a term in common usage. Thus, resort to the legislative history of this language is arguably unnecessary. However, in the case of the FACE statute, Congress underscored the plain meaning of these words. In the Senate's report on their version of FACE, the reporting Committee

emphasized that the section that became Section 248(a)(1), at issue here,

> prohibits force, threat of force or physical obstruction that intentionally injures, intimidates or interferes with someone *only if the offender has acted with the requisite motive:* i.e., only if the offender acts against the target "because" the target of the offender's conduct is or has been obtaining or providing abortion-related services, or it [sic] the offender acts against the target "in order to intimidate" the target (or another person or a class of persons) from obtaining or providing abortion-related services.

S. Rep. No. 103-117, at 24 (1993). In a footnote on the same page, the report notes that

> this motive requirement is not simply a repetition of the scienter requirement – that the offender acted "intentionally," that is, intending to perform the act and aware of the natural and probable consequences of it. Rather, another element of the offense must be proven: that the offender acted out of an abortion-related motive. This construction of the "because" and "in order to" language . . . is consistent with the weight of authority under 18 U.S.C. § 245 and 42 U.S.C. § 3631. . . .

Id. The Senate report later justified FACE's motive requirement by reference to the "Supreme Court's unanimous decision in *Mitchell*. There the Court upheld a 'hate crimes' statute that punishes 'conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason.' " *Id.*, at 29. The report unmistakably reveals the

Senate's inclusion of a specified motive as an element of the offenses prohibited by FACE, establishing penalties "for engaging in a certain constitutionally unprotected conduct based on a prohibited motive." *Id.*, at 30.

II

In a California Supreme Court case involving the constitutionality of a statute with similar "because of" language, the court noted that

> "Because of" is a term in common usage. It connotes a causal link between the victim's characteristic and the offender's conduct, and resembles language found in other civil rights and antidiscrimination statutes. (See, e.g., . . . 18 U.S.C. § 245(b)(2) [prohibiting willful injury, intimidation, or interference with any person because of his or her race, color, religion or national origin and because he or she has been engaging in specified protected activities]; 42 U.S.C. § 3631 [prohibiting interference with any person engaged in housing-related activities because of his or her race, color, religion, sex, handicap, familial status or national origin]; . . . .) We have found no authority holding any of these similar formulations unconstitutionally vague. To the contrary, the Oregon Supreme Court upheld that state's hate crime statute against a vagueness challenge, observing *the statute "expressly and unambiguously requires the state to prove a causal connection between the infliction of injury and the assailants' perception of the group to which the victim belongs."* (State v. Plowman (1992) 314 Ore. 157 [838 P.2d 558, 561, 22 A.L.R.5th 835],. . . .).

In re M.S., 10 Cal. 4th 698, 717, 896 P.2d 1365, 1375 (1995). This causal link between the infliction of the injury and the motive for inflicting it is exactly the prohibited purpose that is embodied in the "because" language employed by 18 U.S.C. § 248. In *United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402 (1999), this Court recently held that, for an illegal gratuity statute containing a similar motivational requirement, "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 1411. This nexus between conduct and motive, as that highlighted in *Sun-Diamond Growers*, is unquestionably an element of FACE that must be proved before penalties can be imposed.

Admittedly, there has been some degree of confusion in the interpretation of these "because" statutes, particularly in determining the relationship between intent, motive, and discrimination. In *United States v. Pimental*, 979 F.2d 282, 283-284 (2d Cir. 1992), the Second Circuit held that "there is no reference to any discriminatory motive" in 18 U.S.C. § 245(b)(1). To the extent that this holding means that the requirement in 18 U.S.C. § 245(b)(2) of racial or religious discrimination is absent in (b)(1), Petitioners agree. However, the case seems to stand for the dicta that only conduct (or intent), and not motive, constitutes an element of a (b)(1) offense. Such a construction would ignore the language of the statute in (b)(1) that the prohibited conduct must be "because" of

one or more federally protected activities.[2] Since 18 U.S.C. § 248 was modeled on 18 U.S.C. § 245(b)(1), it would be wrong to conclude that only conduct, and not motive, is involved in Section 248. "Obtaining or providing reproductive health services" is a federally protected activity under 18 U.S.C. § 248, and a motive element is required.

A similar ambiguity is evident in *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998), the case relied on by the Appellate Court here. The *Weslin* court held categorically that FACE, at least as applied criminally, has no discrimination element: "FACE is a criminal statute and discrimination is not one of its elements." *Id.* at 298. Again, if the Second Circuit is asserting merely that FACE does not require proof of a hatred for women, Petitioners agree. The central passage addressing FACE's mens rea requirement, however, fails to distinguish between intent and motive, betraying a profound confusion on this issue:

> The defendants claim that they did not have the *requisite intent* to violate FACE. Their object was different: to save the lives of unborn children. The defendants cannot, however, avoid conviction by characterizing *their motive* in this manner. *No matter what their ultimate purpose in blockading the clinic may have been,* the defendants do not deny – nor could they plausibly deny – that they meant to block the entrances to the

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[2] By way of counter example, in *Pimental* if the victim Guerrero had been murdered not because he was engaged in federally protected activities, *e.g.*, informing on Pimental, but because of an adulterous relationship with the defendant's wife, the motive required by the statute would not have been met.

> Planned Parenthood clinic on December 7 and that they did so because they wished to prevent the clinic from performing abortions. Congress has expressly defined 'reproductive health services' to include 'services relating to . . . the termination of a pregnancy,' 18 U.S.C. § 248(e)(5). It follows that the defendants, *whatever their motive may have been*, did *intend* to obstruct and interfere with the obtaining and provision of reproductive health services as defined by Congress. *That is all the intent that the statute requires.*

Id. (Italics supplied.) Although the *Weslin* court noted that FACE required proof not only that defendants blocked the entrances, but "that they did so because they wished to prevent the clinic from performing abortions," *id.*, it then went on to assert that the statute requires only the intent "to obstruct and interfere . . . " *id.* This finding is directly at odds with the Senate's explicit claim, quoted above, that FACE requires a motive element above and beyond a showing of intent. S. Rep. No. 103-117, at 24 (1993).

III

The specified motive in FACE requires that the defendant engage in the prohibited conduct *because* someone "is or has been . . . obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1). While this element may be distinguished from certain types of discrimination, motive is analogous to discriminatory purpose, as demonstrated by the fact that the Senate analogized FACE's motive requirement to "conduct motivated by a discriminatory point of view." S. Rep. No. 103-117, at 29

(1993). This Court has held that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker, . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts et at. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296 (1979).

Applied to FACE, this holding demands that the Government show, at a minimum, that Petitioners were motivated to interfere with persons because they were seeking to obtain or provide health services; not merely in spite of that fact. Petitioners, however, have articulated the motive of saving innocent life ("preventing people from . . . 'killing babies' " at SA 398; "The government has never disputed the fact that these people acted for a good reason in their own mind. . . . " at SA 641). While Petitioners may have been aware that their conduct could have some undesirable consequences, they acted *in spite* of these consequences, not *because* of them. Petitioners selected their course of action because of a harmless, legitimate, and praiseworthy desire to save life, in spite of any possible adverse consequences for those seeking to obtain or provide reproductive health services.

B. PETITIONERS' STIPULATION SHOULD NOT BE READ AS CONCEDING PETITIONERS' VIOLATION OF FACE'S MOTIVATIONAL ELEMENT

The stipulation the court of appeals refers to in support of evidence as to Petitioners' motive, *McDaniel* at *3,

reads: "Defendants sat in front of the security door and side door and lay in front of the elev .tor in order to prevent people from receiving, and EWC staff from providing, abortions." SA 33. Petitioners contend that this stipulation goes to conduct, but not to motive. To demonstrate why this must be so, consider the case in which the EWC suffers a heated labor dispute and a portion of the staff go on strike, in the process blocking access to the clinic. While these disputants clearly intend to prevent people from receiving, and the staff from providing, abortions, they do so not *because* the clinic provides abortions, but *because* of their labor dispute with EWC. Similarly, the stipulation here fails to prove that Petitioners acted out of the motive prohibited by FACE.

This Court, additionally, should read the pretrial order as a whole. On the page following the stipulation, the Government itself identifies motivation as an issue to be proved: "Defendants, by physical obstruction, intentionally interfered with – or attempted to interfere with – patients and employees of the EWC because they were obtaining and providing reproductive health services." SA 34. Therefore, this crucial element of the Government's case was not conceded by Petitioners.

C. THE CONDUCT OF THE DISTRICT COURT STRIPPED THE JURY OF ITS FACT-FINDING FUNCTION FOR THE ELEMENT OF MOTIVATION, HOPELESSLY CONFUSING THE JURY ON THIS ISSUE

The record is hopelessly confused on the issue of FACE's motive requirement. The Government denied motive was an issue:

> THE COURT: The government doesn't claim there was any claim of motivation here.
>
> MR. SIEGEL: That is correct.
>
> THE COURT: That is not part of the claim here.
>
> MR. SIEGEL: That is exactly right.

SA 269. The Court denied motive was an issue: "This is a civil case. Motivation and willfulness are not issues here." SA 259.

Most importantly, the jury instructions contained conflicting charges on FACE's motivational element. The first jury instruction included a motivational element: "So the government has to prove . . . that it was done for the purpose of interfering with or preventing people from obtaining reproductive health services. Those are the definitions in the statute." SA 397-398. When reflecting further on the nature of Petitioners' intent, however, the Court's charge lacked such an element:

> One more thing before you retire. I said to you that there *wasn't much of an issue of intent here,* but if you accept the government's theory that there was interference with the ingress or egress of the employees that makes out the violation, then you must find – and I think there is a contested issue here – that the parties *intended to interfere* with the ingress or egress of employees as well as patients.

SA 421. (Italics supplied.) This instruction speaks only of the intention to interfere, completely disregarding the essential element of the reason motivating that interference required by FACE.

When presented with a similar contradiction in the record of *Sun-Diamond Growers* ("the District Court twice read the text of §§ 201(c)(1)(A) and 201(a)(3), but it then incorrectly explained the meaning of that statutory language. . . . " *Id.* at 1410), this Court held such a charge to the jury inadequate. As the Respondent's brief in that case pointed out, "the jury instructions invited the jury to convict on materially less evidence than the statute demands." 1999 WL 21272 at 9. Similarly, with such clear contradiction and manifest confusion concerning the motivational requirement of FACE, it would be unjust to allow the civil penalties resting on such a distorted record to stand. As the Court of Appeals for the District of Columbia Circuit asserted in *United States v. Brewster*, 506 F.2d 62, 79 (1974), speaking of the unlawful gratuity statute 18 U.S.C. § 201(g): "We are certain that the jury could not possibly have discerned the boundary lines on the basis of these instructions, and this a jury must be able to do in order to convict a defendant on any charge."

II. BECAUSE THE PENALTIES HERE WERE CRIMINAL AND THEREFORE REQUIRED DUE PROCESS PROTECTIONS AND IMPLICATE DOUBLE JEOPARDY CONCERNS, THESE PENALTIES CANNOT STAND

A. THE PENALTIES HAD NO RELATION TO ANY DAMAGE SUFFERED BY THE GOVERNMENT, WERE NOT REMEDIAL, BUT PUNITIVE IN NATURE, AND THEREFORE CRIMINAL, REQUIRING DUE PROCESS PROTECTIONS

In *United States v. Halper*, 490 U.S. 435 (1989), this Court held that a penalty labeled civil by the statute

authorizing it may nevertheless constitute punishment if it can be characterized as so "extreme and . . . divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 15. Applying *Halper* to forfeitures, the Court of Appeals for the Second Circuit noted in *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), *cert. denied*, 506 U.S. 815, 113 S. Ct. 55 (1992), that, in order to be civil when "disproportionate to the value of the offense," forfeitures must be "shown to serve articulated, legitimate civil purposes." *Id.* at 35. The court found that compensating the Government for enforcement expenditures or damages caused by the prosecuted conduct was among the primary civil purposes for forfeiture. *See id.* at 35-36. Here, where the Government failed to show damages, withdrew its claim for statutory damages, and proved no costs, $1,000 to $6,000 fines must be considered extreme and completely divorced from any damages the Government may have suffered.

The Government argues that *Halper* cannot be relied upon in light of this Court's more recent holding in *Hudson v. United States*, 522 U.S. 93 (1997). The Court of Appeals, refusing to reach that question, notes nevertheless, quoting *Hudson*, that "whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *McDaniel* at *5. While it may be the case that Congress initially intended fines exacted in civil prosecutions of FACE to be civil, the *Hudson* Court acknowledged that penalties intended to be civil can be transformed into criminal punishments if they are punitive in "purpose or effect." *Hudson*, 522 U.S. at 99. In order to make this determination, this Court approved seven factors as "useful guideposts" including:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99-100. Of these seven factors, five are potentially implicated in the present case. These penalties only come into play on a finding that the requisite intent has been met; they clearly serve the purposes of retribution and deterrence; given the fact that the Government showed no damages, there appears to be no alternative purpose for these fines other than retribution and deterrence; given no viable alternative purposes for them, the fines appear excessive. Unfortunately, the court of appeals refused to work through this analysis, instead dismissing these claims in a footnote, explaining that the penalties could not be punitive due to their relative mildness. Petitioners contend, however, that a fine of $6,000 predicated on no showing of damages is anything but mild.

The court of appeals declined to apply *Halper* and *Hudson* on the ground that these cases "involved double jeopardy issues that are not raised in this case." *McDaniel* at *4. But the claim that a double jeopardy violation must exist before a *Halper* and *Hudson* analysis is triggered gets it exactly backward. In order to determine whether or not a sanction implicates double jeopardy, a court must first

determine, under *Halper* and *Hudson*, whether the sanction in question represents criminal punishment. This must mean that a punitive sanction can be held criminal with or without the threat of double jeopardy, for a second prosecution does not magically transform a prior remedial remedy into a punitive sanction; instead it is the nature of the sanction itself that determines whether or not it is criminal for purposes of double jeopardy analysis.

B. ANY EVIDENCE THAT MAY HAVE TENDED TO SHOW THAT THE FEDERAL PROSECUTION FOLLOWING THE STATE PROSECUTION IN THIS CASE VIOLATED THE DOUBLE JEOPARDY PROHIBITION WAS EXCLUDED

Although normally the "dual sovereignty" doctrine allows for successive state and federal prosecutions for one act that violated different state and federal statutes, one of this Court's seminal cases on the matter, *Bartkus v. People of the State of Illinois*, 359 U.S. 121, 79 S. Ct. 676 (1959), suggested that successive state and federal prosecutions would violate the double jeopardy clause of the Fifth Amendment when one prosecuting sovereign could be said to be acting as a tool for the other. *Id.* at 123. While this exception is admittedly narrow, the district court prevented the admission of evidence concerning the prior state proceeding, precluding the court of appeals from fully considering the merits of any double jeopardy claim, should the fines prove criminal. During the redirect examination of Petitioner Radich, counsel for Petitioners asked:

> Have you already been convicted for this activity, have you already been punished for this activity?
>
> MR. SIEGEL: Objection
>
> THE COURT: It is not relevant. Sustained.

SA-278. Again, during the direct examination of Petitioner Conlon:

> MR. PAGNANELLI [for Petitioners]: Have you already been punished for this activity?
>
> MR. SIEGEL: Objection, your Honor.
>
> THE COURT: Sustained. It is not relevant.

SA-282. Finally, during the direct examination of Petitioner McDaniel:

> MR. PAGNANELLI: Have you been punished for this activity?
>
> MR. SIEGEL: Objection, your Honor.
>
> THE COURT: Sustained.

SA-287.

Without a complete evidentiary record, this case should be remanded to allow Petitioners a hearing on whether the *Bartkus* exception applies. The intimate relationship between the two prosecutions demands a careful examination to ensure that Petitioners are not impermissibly denied their Fifth Amendment protection from double jeopardy. The Government's Complaint references Petitioners' stipulation to facts in the prior state proceeding based on Section 8-803 of Title 8. SA 2. In particular, the Government's Complaint cites Petitioners' stipulation of "physical obstruction of an entrance to a reproductive

health care facility" and Petitioners' conviction on December 6, 1996. SA 8. The ordinance Petitioners were convicted under, as described above, carefully mirrors FACE. Additionally, the Government's Complaint was filed the same day that Petitioners were convicted of the State charges.

The fact that Petitioners' first conviction was under a local ordinance passed soon after FACE, and designed to punish activity identical to that targeted by FACE, may also suggest the need for a reexamination of the dual sovereignty rule of double jeopardy analysis in this situation. Judge Calabresi noted in his excellent concurring opinion to *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483 (2d Cir. 1995):

> As Judge Adams states phrophetically for the Third Circuit in *United States v. Grims*, 641 F.2d 96 (3d Cir. 1981), at a time when the growth of federal criminal law had not yet reached its present extremes, 'the recent expansion of federal criminal . . . jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well,' since 'permitting successive state-federal prosecutions for the same act [appears] inconsistent with what is a most ancient principle in western jurisprudence – that the government may not twice place a person in jeopardy for the same offense.' *Id.* at 100-01.

Id. at 498-499. This Court's *Bartkus* decision also refers to an 1820 Supreme Court case, *Houston v. Moore*, 5 Wheat. 1 (involving the constitutionality of a Pennsylvania statute punishing the violation of a federal conscription law), in

which Justice Washington reflected his belief that a state statute imposing state sanctions for a violation of federal law implicated double jeopardy principles. *Bartkus*, 359 U.S. at 130. Although Petitioners were first convicted under a local ordinance, the manner in which this ordinance mirrors the federally enacted statute casts doubt on its independent standing.

Judge Calabresi reasoned that "re-prosecutions in emotionally and politically charged contexts" are especially suspect: "it was to avoid political pressures for re-prosecution that the Double Jeopardy Clause was adopted." *Id.* at 499. Surely there are few issues in America today more emotionally and politically charged than those centering around abortion and its protesters. For this reason, Judge Calabresi's assertion is particularly appropriate here: "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome." *Id.*

CONCLUSION

For the foregoing reasons, it is respectfully urged that this case be granted a writ of *certiorari* to the Court of Appeals for the Second Circuit.[3]

Dated: New York, New York

June 21, 1999

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[3] Petitioners gratefully acknowledge the pro-bono briefing services of law student Joel Thollander both in the Second Circuit Court of Appeals and on this Petition.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26 day of March, one thousand nine hundred and ninety-nine.

PRESENT: (Filed March 26, 1999)

HON. JAMES L. OAKES,
HON. GUIDO CALABRESI,
HON. JOHN R. GIBSON,*
Circuit Judges.

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* The Honorable John R. Gibson, Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SUMMARY ORDER
No. 98-6142

RUBY McDANIEL, FRANCIS PAGNANELLI, JOSEPH O'HARA, JOSEPH GREGG, JAMES McWILLIAMS, WILLIAM CONLON, EDWARD GERLACH, CHARLES RADICH, OTTO BUCHTA, and WILLIAM RAISER,
Defendants-Appellants.

Appearing for Appellants:
A. LAWRENCE WASHBURN, JR., New York, NY.

Appearing for Appellee:
MARTIN J. SIEGEL, Assistant United States Attorney, *for*
MARY JO WHITE, United States Attorney for the Southern District of New York (Steven M. Haber, Assistant United States Attorney, on the brief).

Appeal from the United States District Court for the Southern District of New York (John E. Sprizzo, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal is AFFIRMED.

Defendants appeal from a judgment of the United States District Court for the Southern District of New York (Sprizzo, *J.*) ordering the payment of civil penalties based on their violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994) ("FACE"). Defendants argue that the government was required to demonstrate that they acted with discriminatory animus against women in order to make out a violation of FACE.

They further challenge the propriety of the imposition of civil penalties absent a showing of damages on the part of the government. We affirm.

DISCUSSION

The defendants are ten individuals who, on July 23, 1996, entered the building of a Manhattan abortion clinic and physically blocked the elevator and door entrances to the clinic by locking themselves together at the neck and ankles. As a result of the defendants' actions, no one was able to gain access to the clinic for several hours until the police forcibly removed them. After a jury found the defendants liable for violating FACE, the district court entered an order permanently enjoining the defendants from obstructing or being present at the clinic. Then, after holding two hearings on the question of whether civil penalties were appropriate, the district court imposed such penalties, ranging from $1,000 to $6,000, on those defendants with sufficient financial resources.[1]

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[1] The government notes that one defendant, James McWilliams, did not answer the government's complaint and was found to be in default by the district court. The government argues, therefore, that we should affirm McWilliams' $2,000 civil penalty based on his default. Because we affirm his co-defendants' civil penalties on the merits, we do not discuss whether McWilliams' default precludes our review of his appeal. For the same reason, we do not discuss whether or not defendants Buchta, McDaniel, and Raiser, against whom no penalties were imposed due to their insufficient financial resources, have standing in this appeal.

I

This Circuit's recent decision in *United States v. Weslin*, 156 F.3d 292 (2d Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 804, precludes the mens rea argument raised by defendants. In *Weslin*, we held that the intent element of FACE is satisfied if a defendant meant "to obstruct and interfere with the obtaining and provision of reproductive health services." *Id.* at 298. This holding follows from the statute itself, which proscribes interfering with a person's access to reproductive services "because that person is or has been . . . obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).[2] Defendants stipulated that their purpose in blockading the clinic was "in order to prevent people from receiving and [the clinic] staff from providing, abortions." [**SA** 33] Defendants' actions, therefore, fall squarely within the ambit of the statute.[3]

II

In FACE, Congress provided that the Attorney General may institute civil proceedings against parties who violate the statute. *See* 18 U.S.C. § 248(c)(2)(B). The statute

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[2] In this regard, FACE was enacted to fill the gap left after the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), in which the Court held that the application of 42 U.S.C. § 1985 requires the government to demonstrate some kind of discriminatory animus on the part of the party blocking a clinic entrance. *See id.* at 268-74.

[3] Because we believe defendants' actions to be clearly within the statute, we need not consider whether defendants waived their right to appeal this issue.

further sets forth that a district court, in addition to the provision of civil damages and/or injunctive relief, "may . . . assess a civil penalty against each respondent." *Id.* Defendants argue, however, that the imposition of monetary penalties against them by the district court, in the absence of proof by the government that it has suffered commensurate damages as a result of their actions, rises to the level of criminal punishment and requires the government to meet a heightened evidentiary standard.[4]

The Supreme Court has made clear that "[w]hether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *Hudson v. United States*, ___ U.S. ___, 118 S.Ct. 488, 493 (1997). A reading of the statute manifestly demonstrates that Congress intended penalties of this sort under it to be classified as civil. *See* 18 U.S.C. § 248(c)(2)(B) (permitting courts to "assess a civil penalty"). Moreover, the penalties assessed by the district court in this case were quite modest.[5] We therefore conclude that the penalties

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[4] Defendants rely on *United States v. Halper*, 490 U.S. 435 (1989), to make this argument. The government counters that *Halper* is of questionable validity in light of the Supreme Court's more recent decision in *Hudson v. United States*, ___ U.S. ___, 118 S.Ct. 488 (1997). We need not reach the question – for both *Halper* and *Hudson* involved double jeopardy issues that are not raised in this case.

[5] Although the Court noted in *Hudson* that "[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect . . . as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty," *Hudson*, 118 S.Ct. at 493 (internal quotation marks and citations omitted) (alteration in

imposed on the defendants were civil in nature and should be affirmed.

* * *

The judgment of the district court is affirmed.

For the Court,

CAROLYN CLARK CAMPBELL

by: /s/ Lucille Carr

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original), the relatively mild penalties assessed in this case, imposed with careful consciousness of capacity to pay, do not rise to the level of "punitive."

JUDGMENT

Counsel of Record is advised by Clerk of Court of Appeals that the Summary Order constitutes the Judgment of the Court in this case.